Public Hearing on
Bill 15-968 – "First Amendment Rights and Police Standards Act of 2004"

Committee on the Judiciary
The Honorable Kathy Patterson, Chair
Council of the District of Columbia

Testimony of
Charles H. Ramsey
Chief of Police
Metropolitan Police Department

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Madame Chair, members of the Committee, staff and guests – I appreciate the opportunity to present this opening statement for the record and, along with the other Metropolitan Police officials who are here today, to answer your questions. This statement only summarizes the Department's response to the proposed legislation, and I want the Committee to know that we are preparing a more detailed analysis, with recommendations. For the benefit of the audience watching on Channel 13 and others, the text of my statement is posted on our Department's website: www.mpdc.dc.gov.

Let me begin by once again acknowledging the work of the Committee on this issue. I respect the oversight role of this Committee and the scrutiny that comes with your role. Throughout this process, the Metropolitan Police Department has cooperated fully with the Committee and with your Special Counsel.

As I have stated on many occasions, the mission of the police involves much more than protecting life and property. The police also have the unique and solemn responsibility to uphold the very rights and freedoms that define us as Americans, in particular the rights guaranteed by the First Amendment to the Constitution. Our Department takes that responsibility very seriously. We work extremely hard to fulfill that responsibility each and every day. We regularly examine our policies and procedures in this area, and we constantly look for ways to improve our performance.

It is with this commitment in mind that I want to make one broad clarification – right up front – concerning the legislation that is now before the Committee. In many places, the bill refers to "investigations involving First Amendment activities." I want to make it perfectly clear, to the Committee and to the public, that the Metropolitan Police Department <u>does not</u> initiate or conduct investigations based solely on the exercise of First Amendment rights or on the content of speech or assembly. If we have reason to believe that individuals or groups who are exercising their First Amendment rights may also be engaging in criminal activity, we may initiate an inquiry or investigation. But our Department does not – and will not – investigate individuals or groups solely because they are exercising their First Amendment rights or because of the content of what they are saying.

Our job is to protect and defend the rights of all individuals and groups to exercise their Constitutional rights in a peaceful and lawful manner. And our policies, procedures, training and operations are all designed with that mission in mind. I would hope that both the record of today's hearing and any legislation ultimately considered by this Committee and Council will reflect that critical distinction.

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As you know, our Special Operations Division currently manages 300 or more different demonstrations, marches or rallies each year in our city. In addition, individual police districts and other MPD elements handle dozens of other, *ad hoc* protests on a routine basis. Interestingly, the vast majority of demonstrations in our city – about 3 out of 4, in fact – are rallies and marches for which permits have not been granted. These are events that often spring up without advance notice, but which we must respond to and manage, in order to ensure the safety of the public and the demonstrators themselves.

Whether permitted or non-permitted, the vast, vast majority of demonstrations in our city are lawful and peaceful, with no intention on the part of individuals or groups to engage in criminal behavior. Our department recognizes this fact, and we work closely with the vast majority of protest organizers – using our discretion, our flexibility, our experience and our good judgment in order to ensure successful outcomes.

At the same time, all of us need to recognize that there are some demonstrations in DC – small in number, but present nonetheless – in which individuals or groups do express a stated purpose of destroying property, disrupting traffic or commerce, or engaging in other criminal behavior during the course of their First Amendment activities. When a protest group announces on its website and to the news media its intent to host a "scavenger hunt" that awards points for smashing windows or spray-painting private property, the police must take notice and we must prepare. We simply cannot ignore such threats or wait until after the fact – after the damage has been done – to respond. We must take action, and we must have some flexibility in what actions we can take to ensure the peace.

The bottom line: just as the police need some discretion and flexibility in how we respond to the small, *ad hoc*, peaceful, non-permitted demonstrations that take place practically every week in our city, we also require some measure of flexibility in handling those events where there is the potential for violence, property destruction or other criminal activity. We also need sufficient flexibility to respond to changing circumstances and conditions, including the ongoing threat of terrorism. I firmly believe that when it comes to operational matters, our Department needs the ability and the flexibility to make decisions that we, in good faith, believe are in the best interests of public safety. And I also believe that we should always be held accountable for the decisions that we do make.

To the extent that the bill before the Committee provides our Department with reasonable policy guidelines and sufficient flexibility in carrying out those guidelines, we are supportive of the legislation. In other areas, however, we believe the bill unduly prescribes specific operational procedures that are not only inappropriate for being written into law, but which also could undermine our effectiveness in managing the range of demonstrations that take place in our city and could ultimately threaten both public and officer safety.

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In many sections, the legislation outlines policies and procedures that our Department has already implemented through our Mass Demonstration Handbook and other internal regulations. For example, before last weekend's IMF and World Bank event, we issued updated policies in such critical areas as verbal warnings, prisoner processing, and notification of arrestees' rights and options. These and other recent reforms are generally consistent with the guidelines contained in the bill.

The legislation also provides guidelines on the collection and use of intelligence information during preliminary inquiries and criminal investigations that involve individuals or groups that may also be engaging in First Amendment activities. Again, these proposed guidelines generally mirror existing MPD policies and procedures, and they provide sufficient flexibility that would allow our Department to conduct such inquiries and investigations in an effective and efficient manner.

We do have one specific recommended change, however. Section 208 of the bill provides for auditing of the Department's preliminary inquiries and investigations in this area. We welcome this scrutiny, but disagree with having the Office of Citizen Complaint Review serve as the auditor. We believe it would create a conflict of interest to have the OCCR audit the very same information and records that might also be the basis for a citizen complaint investigated by the OCCR. As an alternative, we feel that the Office of the Inspector General possesses the resources, the expertise and the independence to fulfill the auditing role as outlined in the legislation.

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While there are other areas in which we support the proposed legislation, there are also some provisions that we must respectfully object to, and would ask the Committee to reconsider or revise. Again, these will be detailed in a companion document to my testimony.

First, the Department feels that the authorization for non-permitted demonstrations, as outlined in Section 105, is much too broad, and some of the procedures for non-permitted demonstrations, as outlined in Section 106, would be impractical to carry out.

As I pointed out earlier, our Department recognizes that there will always be non-permitted demonstrations in our city, and we will always do our best to manage those events. However, to the greatest extent possible, it is critical for our Department to be notified, in advance, of all demonstrations. Advance notification permits our managers to allocate resources appropriately, and reduces the likelihood of having to take resources out of our neighborhoods at the last minute in order to manage a demonstration downtown.

The legislation, as currently written, would likely end up requiring the MPD to respond to an even greater number of non-permitted demonstrations than we already do. This will inevitably require more officers to cover all possible contingencies, than would be needed if we received advance notice and could plan accordingly. Absent this advance notification, Department managers will, in some instances, be forced to take officers out of their assigned PSAs – possibly even out of their assigned districts – in order to respond to and manage unplanned events. At a time when our Department is working hard to maximize our presence in the PSAs, this type of scenario will certainly set us back.

The permit application process has another important benefit: it establishes a dialogue between demonstration organizers and public safety personnel. This dialogue provides an opportunity for both parties to assess how the event will unfold and to develop a share set of expectations and procedures. This up-front dialogue and planning support the best interests and safety of the demonstrators, our officers and the community at large.

The Department specifically opposes the provision in Section 105 that authorizes non-permitted demonstrations when the organizers anticipate fewer than 50 participants. Demonstrations are not "invitation-only" events. And depending on how widely an event is publicized, organizers will seldom know in advance whether or not their particular event will reach what is an arbitrary threshold of 50. At the same time, it would be a mistake to assume that a Ku Klux Klan rally consisting of 49 participants requires less advance planning via the permitting process than a less controversial demonstration with 51 (or event 251) participants. The reality is that everybody – including protest organizers and individual demonstrators themselves – benefit from the dialogue and planning that are established through the permitting process. We recommend that the legislation not encourage more non-permitted demonstrations, as the current draft does.

On a related matter, the Department opposes the creation of an arbitrary deadline for the modification of permits. While we certainly support up-front planning, we feel that requiring all plans be finalized nearly two weeks before the event is impractical for both the Department and the event organizers, who themselves often seek changes to assembly locations and parade routes right up to the last minute. Given the District's unique status as both the Nation's Capital and a prime target for terrorism, our Department must have the flexibility and the authority to respond to threats and changing circumstances – up to, and including, the authority to cancel an event should the circumstances warrant. The Department agrees that any changes must be communicated to event organizers and possible alternatives explored. But we strongly oppose the imposition of any arbitrary restrictions on our ability to make changes in demonstrations that are in the interest of public safety.

Another area of concern involves restrictions on the use of dispersal orders, as contained in Section 106 of the bill. As I mentioned earlier in my testimony, the Department has implemented significant reforms in how we carry out dispersal orders on the street, including the number of warnings that are given, amplification and the like. However, this legislation would limit our ability to use dispersal

orders when, in our best law enforcement judgment, such orders would be in the interest of public safety. The Department must maintain our authority to disperse demonstrations as circumstances and safety imperatives dictate.

It is important to remember that law enforcement personnel are often outnumbered at these events, and a small group of determined agitators can threaten the safety of themselves, other demonstrators within the larger crowd, police officers and the public. In these types of situations, a dispersal order can actually help to de-escalate tensions by disrupting a growing "mob mentality" that can develop in certain crowds. Dispersal orders can also assist officers in gaining control of a situation without have to escalate the level of force that might otherwise be required. Removing the option of giving dispersal orders would take away an important tool in our use-of-force continuum, and could actually cause officers to use a level of force that would not otherwise be required to get a situation under control. The problems with this section are exacerbated by ambiguous language and impractical standards (such as knowing when "assembly members … are about to engage in unlawful disorderly conduct"). I urge that the Committee rethink this bill's position on the use of dispersal orders.

For much the same reason, we also disagree strongly with Section 107 of the legislation, which would severely limit our Department's authority to establish a police line in certain situations. It is not unheard of for even a permitted parade to veer off on a non-permitted route. In fact, this very situation occurred last year when leaders of a permitted anti-war march through various Northwest neighborhoods began leading the parade on streets that were off the agreed-upon route. As we soon discovered, this impromptu alteration in the parade route was made by a small group of protest organizers, unbeknownst to the vast majority of people who were following them. In this particular situation, our alternatives were to: a) establish a police line and get the marchers back on the agreed-upon route, or b) attempt to arrest them for parading on streets without a permit. Obviously, establishing a police line was the preferred option – for the police, the marchers, motorists in the area, and the public at large. Indeed, the purpose of establishing a police line in this type of situation is to avoid arrests and get participants back on their permitted parade route. Such common-sense tactical decisions would be broadly limited by the legislation as written.

Section 110, which would severely limit the ability of police to restrain individuals who are under arrest, also presents serious safety concerns for both our officers and the arrestees themselves. During mass arrest procedures, arrestees are frequently held in facilities that are not nearly as secure as a cellblock. And in many cases, the arrestees are processed by civilian or limited-duty personnel who lack the full range of options for ensuring that prisoners are not disorderly and are not a threat to other arrestees in the facility. Among the recent updates to our Mass Demonstration Handbook are new procedures on restraining prisoners in a manner that is secure and, yet, as comfortable as possible. We believe it is inappropriate and potentially dangerous to legislate these types of specific procedures that impact officer safety.

Section 111 establishes requirements for reporting to the public on demonstration-related activities. We do not object to the reporting requirements, although we find the obligation to report on arrestees held longer than four hours to be unrealistic. Four hours is simply an unreasonable length of time to process arrestees, especially in situations where hundreds of people have been arrested or when the arrestees themselves refuse to identify themselves. The U.S. Supreme Court has recognized that up to 48 hours is a reasonable time in which to process arrestees.

Finally, I am somewhat concerned that a strict interpretation of Section 206 could preclude MPD members, including our civilian employees, from participating in First Amendment activities on their own time. This section seems to establish a requirement that MPD members must have a "legitimate law enforcement objective" before they can attend a meeting or participate in an event on their own time that is related to the exercise of First Amendment rights. I would recommend that this language be clarified.

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In closing, I think it is important to point out that all of us – the Metropolitan Police Department, this Committee and the full Council, indeed the entire community – share the same basic goals: to defend and protect the First Amendment rights of all citizens, while also ensuring the safety and security of our city and its residents, workers, business owners and visitors. While these two goals are seldom in conflict, when such a conflict does arise, it is generally the police who have the difficult job of balancing the competing interests and ensuring the peace.

This is a responsibility that the Metropolitan Police Department takes very seriously. As I mentioned earlier, we recognize our unique role as defenders of the Constitution, and we plan, we train and we perform to the best of our ability in fulfilling that role. Are we perfect? No. But are we among the best in the country when it comes to managing the full range of demonstrations and special events that occur in a city such as Washington, DC? Yes. And are we constantly exploring new ways to improve our performance? Absolutely.

To the extent that this legislation moves us forward in our efforts at continuous improvement, we support the bill. But in those areas where we believe the proposed legislation could hinder our ability to safeguard rights and protect life and property, then we must respectfully disagree. I would hope that the Committee will take a careful look at our recommendations. My staff is available to work with you on implementing any amendments that could strengthen this legislation.

Thank you very much.